

Carman (Migration) [2023] AATA 3822 (3 November 2023)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr William Carman

CASE NUMBER: 1913786

HOME AFFAIRS REFERENCE(S): BCC2017/3295059

MEMBER: Edward Howard

DATE: 3 November 2023

PLACE OF DECISION: Brisbane

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl 820.211(2) of Schedule 2 to the Regulations
- cl 820.221(1) of Schedule 2 to the Regulations
- reg 2.03A

Statement made on 03 November 2023 at 4:01pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – Schedule 3 criteria – factors beyond applicant's control – waiver of requirement – compelling reasons – imminent birth of child – long-standing relationship – genuine de facto relationship – financial aspects – nature of the household – social aspects – nature of the commitment – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5CB, 65, 360
Migration Regulations 1994 (Cth), rr 1.09A, 2.03; Schedule 2, cls 820.211, 820.221; Schedule 3, Criterion 3001, 3003, 3004

CASES

Babicci v MIMIA (2005) 141 FCR 285
He v MIBP [2017] FCAFC 206

MZYPZ v MIAC [2012] FCA 478
Waensila v MIBP [2016] FCAFC 32

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the review applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
3. The review applicant applied for the visa on 8 September 2017 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the review applicant did not satisfy cl 820.211(2).
5. In reaching its decision the Tribunal did not consider a hearing to be necessary, as it was able to find in favour of the review applicant on the basis of the material before it, pursuant to s 360(2)(a) of the Act.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

7. AND LAW

ISSUES

8. There is a two-stage process for onshore Partner visas. A visa applicant must first hold a provisional visa, enabling them to remain in Australia on a temporary basis, prior to the grant of a permanent visa. The grant of a permanent visa would generally depend on whether the relationship has continued for a period of at least two years. In this matter, the Tribunal is considering the first, temporary stage.
9. Where the Tribunal is considering a criterion that requires the definition of spouse or de facto partner to be met at the time of the visa application, the information supplied in relation to the reg 1.09A(3) matters may relate to circumstances after the time of application. In forming a view of the relationship at the time of application, the Tribunal must consider all relevant evidence, which may include evidence of events after the date of application insofar as it assists in the task of determining whether the visa applicant and the sponsor were in a partner relationship at the time of the application. Evidence of events after the visa application is relevant if it tends logically to show the existence or non-existence of facts relevant to the issue to be determined.¹ The Tribunal observes this to be a matter where the visa applicant submitted limited documentary evidence in support of his visa application to the Department of Home Affairs and then furnished the Tribunal with further evidence that was unavailable to the primary decision maker.
10. The issue in the present case is whether at the time of the visa application and the time of this decision, the review applicant is the spouse or de facto partner of the sponsor.

¹ *Ally v MIAC* [2008] FCAFC 49 at [32]–[35]; *Jayasinghe v MIMA* [2006] FCA 1700 at [35], citing *MIEA v Poche* (1980) 4 ALD 139 at [24] per Deane J which held that evidence of subsequent events may be taken into account if it ‘tends to logically show the existence or non-existence of’ the relationship at that particular time; and see also *Bretag v IRT* [1991] FCA 582 at [13]–[15].

Whether the parties are in a spouse or de facto relationship

11. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the review applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the review applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

12. Are the parties in a de facto relationship?

13. 'De facto partner' is defined in 5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s 5CB(2).
14. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.09A(3) which is attached to this decision. Each of the specific matters contained in reg 1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.
15. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in reg 2.03A. Both members of the couple must be at least 18 years old: reg 2.03A(2). In this case, at the time of application, the review applicant and the sponsor were at least 18 years old.
16. The review applicant must have been in the de facto relationship for at least the 12-month period ending immediately before the date of the application: reg 2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the review applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
17. The evidence of the parties is that they met in 2016 when introduced by friends. They started dating and commenced a de facto relationship on 27 August 2016. As a couple they initially lived with family friends, then with the sponsor's parents, before moving into their residence at Robina where they have remained since 2017. The Tribunal is satisfied on the evidence, that the parties were in a de facto relationship from 27 August 2016.
18. In view of the above evidence, the Tribunal finds that the review applicant and sponsor were in a de facto relationship for at least 12 months prior to the date of the application, being 8 September 2017. The parties therefore satisfy Reg 2.03A(3).
19. For these reasons the Tribunal is satisfied that the visa applicant meets the additional criteria prescribed in reg 2.03A.

20. Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

21. At the time the application was made, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).

22. A visa applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, a visa applicant must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d)(ii).
23. It is not in dispute that the review applicant in the present case did not have a substantive visa at the time of application. The issue in the present case is whether the review applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria.
24. As noted in the delegate's decision record, the review applicant satisfies criterion 3001 and criterion 3003. The review applicant must therefore also satisfy criterion 3004 in order to meet the Schedule 3 criteria.
25. In order to satisfy criterion 3004, the review applicant must, firstly, satisfy 3004(c), namely that he is not the holder of a substantive visa because of factors beyond his control. Having considered all the material available, the Tribunal concludes that there is no evidence to support the contention that the review applicant's failure to hold a substantive visa was caused by factors beyond his control.
26. In view of this, the review applicant is unable to satisfy criterion 3004 and therefore fails to meet the Schedule 3 criteria.
27. However, cl 820.211(2)(d)(ii) allows for this criterion to be waived if the Tribunal is satisfied that there are compelling reasons for not applying the criterion.

28. Compelling Reasons

29. As the Tribunal has found that the review applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
30. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
31. The parties have provided evidence to the Tribunal of the pregnancy of the sponsor and the imminent birth of a child (a son), of the sponsor and review applicant.
32. The Tribunal is mindful of the fact that if the review applicant is not granted a waiver in this case, there is the distinct possibility that he would have to remain outside of Australia without his wife or child. If this were to occur, the sponsor would be deprived of the financial, emotional and psychological support of her partner for herself and in caring for the child. Additionally, the child would be deprived of the care and support of his father.
33. If the sponsor and child were to leave Australia to live with the review applicant, it is clear that the child would not have full access to all the benefits of an Australian child that would have been granted him if the family were living in Australia. All of the sponsor's family are Australian citizens who reside in Australia. The sponsor would be deprived of the emotional

and other support of her parents and siblings, and the child would be deprived of the care, support and relationship of his grandparents and extended family.

34. The Tribunal finds that in the event that the sponsor and child are deprived of the care and support of their partner and father, they are likely to suffer significant emotional and psychological harm.
35. Further, the Tribunal takes note of the fact that Australia is a signatory to the *Convention on the Rights of the Child*, which recognises the family as the fundamental group of society and the natural environment for the growth and well-being of all members, particularly children.
36. Additionally, in considering the issue of '*compelling reasons*', the Tribunal has had regard to the *Migration Regulations (Amendment) 1996 NO. 75* and in particular to the *Explanatory Statement*. Clause 10 of Schedule 2 gives examples of circumstances in which a waiver may be justified. Clause 10.1 states that the reasons must be of a "*strongly compassionate nature*" and refers to such reasons as including those '*where the applicant and his or her nominator are already in a long-standing relationship which has been in existence for two years or longer*'.
37. In the present case, the parties are already in a long-standing relationship which has been in existence for a period of more than seven years.
38. Having considered all the evidence, the Tribunal finds that there are *highly compelling and compassionate circumstances* that affect the interests of Australian citizens that justify the waiver of the requirements of PIC 3004.

Are the other requirements for a de facto relationship met?

Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.

39. The parties have provided the Tribunal with extensive evidence relating to the financial aspects of their relationship. The Tribunal is in receipt of bank statements from their Commonwealth Bank joint account.
40. The evidence also discloses the sharing of household and pooling of their resources for the payment of regular expenses from their accounts.
41. The parties have lived at the same residence in Robina together since 2017. The parties have provided documentation attesting to the joint tenancy and their continued residence at the property is evidenced by correspondence from the managing agent.
42. The Tribunal is satisfied on the evidence of the parties, that they pool their resources for day-to-day household expenses and other financial commitments and that they have the joint liability attached to the joint tenancy of their residence. The Tribunal is satisfied that both parties have contributed to the financial aspects of the relationship. The Tribunal weighs the financial aspects of relationship in favour of the review applicant.

Nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.

43. As noted above, the parties commenced living together at the residence of a family friend of the sponsor and then at the residence of the sponsor's parents. The parties eventually

commenced renting a property together in Robina, Queensland in 2017. The parties have lived together, continuously, at this address over a period of more than six years.

44. The Tribunal is satisfied that the parties' household and living arrangements are consistent with that of a de facto couple in a genuine relationship. The Tribunal weighs consideration of the household aspects of the relationship in favour of the review applicant.

Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.

45. The parties have provided extensive evidence supporting their claim of being a de facto couple in a genuine relationship. The evidence demonstrates the clear recognition by other people, of the relationship between the parties, recognising the parties as a genuine couple over a period of more than seven years.
46. The evidence includes, inter alia, statements in support from family members and friends of the parties who have known them for the entire time of their relationship both from a personal and professional perspective.
47. The Tribunal is satisfied on the evidence that the parties represent themselves to other people as being in a de facto relationship, that they hold the favourable opinion of family, friends and acquaintances about the nature of the relationship and that they regularly plan and undertake joint social activities. The Tribunal weighs the social aspects of the relationship in favour of the review applicant.

Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.

48. The evidence of the parties is that they met in 2016 when introduced by friends. They started dating and commenced a de facto relationship on 27 August 2016. As a couple they initially lived with family friends, then with the sponsor's parents, before moving into their residence at Robina.
49. The parties have lived at the same residence in Robina together since 2017. The parties have provided documentation attesting to the joint tenancy and their continued residence at the property is evidenced by correspondence from the managing agent.
50. The parties have provided evidence of a strong financial relationship, together with evidence of household and living arrangements over an extended period of time consistent with that of a de facto couple in a genuine, long-term relationship. The evidence demonstrates the clear recognition by family and friends of the relationship between the parties, recognising the parties as a genuine couple over a period of more than seven years.
51. Additionally, the parties have provided evidence to the Tribunal of the pregnancy of the sponsor and the imminent birth of a child (a son), of the sponsor and review applicant.
52. From the evidence provided, the Tribunal finds that the parties are in a genuine and continuing relationship, show a strong commitment to each other, provide significant emotional support to each other and clearly see the relationship as long-term. The Tribunal weighs the nature of the commitment in favour of the review applicant.

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55. Overall Conclusions

56. As noted above, the Tribunal finds that there are *highly compelling reasons* for not applying the Schedule 3 criteria. Accordingly, the applicant meets cl.820.211(2)(d)(ii).
57. Having carefully considered all the evidence and for the reasons above, the Tribunal is satisfied that at the time of application, the parties had a mutual commitment to a shared life to the exclusion of all others; that the relationship between them was genuine and continuing; and that they have lived together as a de facto couple since August 2016. The Tribunal is therefore satisfied the requirements of section 5CB of the Act were met the time of the visa application.
58. The Tribunal is further satisfied that at the time of this decision the parties continue to have a mutual commitment to a shared life to the exclusion of all others and that the relationship between them has been and remains genuine and continuing. The Tribunal is also satisfied that they have lived together or not separately and apart on a permanent basis. The Tribunal is therefore satisfied the requirements of section 5CB(2)(a)-(d) of the Act are met at the time of this decision.
59. The Tribunal is therefore satisfied that the parties' relationship fulfilled the criteria contained in clause 820.211(2) of the regulations at the time the visa application was made.
60. Pursuant to clause 820.221(1), in order to be eligible for the grant of a subclass 820 (UK) visa, the review applicant must also continue to meet the requirements of clause 820.211(2) at the time of this decision. Having regard to the evidence before the Tribunal, the Tribunal is satisfied that the review applicant continues to meet the requirements of clause 820.211(2), hence satisfying the criteria in clause 820.221(1).
61. Therefore, the Tribunal finds that the review applicant meets the requirements of clauses 820.211(2) and 820.221(1).
62. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

63. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the review applicant meets the following criteria for a subclass 820 (Partner) visa:

64.

- cl 820.211(2) of Schedule 2 to the Regulations
- cl 820.221(1) of Schedule 2 to the Regulations
- reg 2.03A
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Edward Howard
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).